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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay	)	
Telephone Reclassification	)	CC Docket No. 96-128
and Compensation Provisions of	)	
the Telecommunications Act of 1996	)	

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COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.

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SUMMARY OF COMMENTS

In its Comments, Excel Telecommunications, Inc. ("Excel") demonstrates that in instances where payphone service providers ("PSPs") are not already fairly compensated by marketplace forces, per-call compensation should be set at the marginal cost of using the payphone to place the call. In fact, the Notice expressly recognizes this in two separate instances. In addition, Excel shows that the plain language of Section 276(b)(1)(A) of the Telecommunications Act of 1996 encompasses per-call compensation for interstate and intrastate calls, but not international calls. The only justifiable way to interpret this provision is that international calls must be excluded from the per-call compensation mechanism. Finally, again based on the unambiguous language of Section 276, compensation must be paid for completed calls only. Completed calls should encompass calls to debit card or access code platforms as well as calls where answer supervision is unavailable.

Excel's Comments also show that the per-call compensation proposed in the Notice, rather than minimizing transaction costs, would actually significantly increase administrative and transaction costs for interexchange carriers ("IXCs"). In fact, Excel and all other IXCs would be required to enter into a transaction with each private or public payphone service provider every time compensation was due. IXCs should not be burdened with this responsibility; rather, the Commission should consider other alternatives, including requiring local exchange carriers to collect and pay compensation or requiring PSPs to track such calls.

Finally, these Comments show that while the Notice tentatively concludes that either a carrier-pays or set use fee method would impose payment on the end user, this would not in reality be the case. In actuality, both of these methods impose the payment requirement on the IXC. Instead of creating another level of intermediary administrative control, the Commission should consider imposing such a payment requirement directly on the cost-causer, the end user.

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COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.

Excel Telecommunications, Inc. ("Excel"), by its attorney and pursuant to the Commission's Notice of Proposed Rulemaking released on June 6, 1996,[1] hereby submits its initial comments in the above-captioned proceeding.

I. INTRODUCTION

Excel is one of the fastest growing providers of long distance telecommunications services in the U.S. As a reseller which commenced operations in 1989, Excel provided service to approximately 1.9 million residential and small business customers as of December 31, 1995. The Company offers a variety of long distance services and products, including residential service, commercial service, 800 service, international services and calling cards. Excel's continuing growth has resulted in the company's recent participation in an initial public offering,

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[1] In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-128 (released June 6, 1996) ("Notice"). While comments in this proceeding were originally due on June 27, 1996, the Commission extended the deadline to July 1, 1996. See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, CC Dkt. No. 96-128 (released June 20, 1996).

and Excel is now traded on the New York Stock Exchange. Since Excel's services are accessed by its customers from pay telephones, Excel has a significant interest in this proceeding.

Excel's Comments demonstrate below that per-call compensation should be set at the marginal cost of using the payphone to place the call; international calls should be excluded from the compensation mechanism; and only completed calls should be compensated. These Comments also demonstrate that despite the Notice's objective of minimizing transaction costs to the industry, the proposed compensation plan would substantially increase the burden placed on Excel and other interexchange carriers ("IXCs"). Finally, Excel argues that the Notice's proposal should, but does not, impose compensation requirements on the actual cost causers, i.e., the end users.

II. PER-CALL COMPENSATION

As discussed below, Excel believes that per-call compensation should be set at the marginal cost of using the payphone to place the call; international calls should be excluded from the compensation mechanism; and only completed calls should be compensated.

A. Per-call Compensation Should be Set at Marginal Cost

In instances where payphone service providers ("PSPs") are not already "fairly compensated" by marketplace forces, the Commission should set per-call compensation at the marginal cost of using the payphone to place the call.

Excel agrees with the Notice's explicit recognition that PSPs should recover the marginal cost of calls placed at their payphones. In footnote 34 of the Notice, the Commission acknowledges that "[t]he issue of fair compensation arises only in cases where a caller uses a

PSP's equipment to dial around the payphone's presubscribed IXC, because the PSP does not receive any revenue to cover its marginal cost in originating the call...."[2] In footnote 64, the Notice also recognizes that "local coin rates in some jurisdictions may not cover the marginal cost of the service."[3] Thus, the Notice makes clear that marginal cost should establish the basis for setting the per call compensation amount. Excel concurs with the Notice's acknowledgement that the appropriate standard is marginal cost, and believes that the marginal cost methodology should be applied uniformly to all payphone calls.

To the extent that the Commission does not have access to data necessary to allow a determination of marginal cost in the context of this proceeding, the Commission should take necessary steps to obtain such information. Under a marginal costing approach, per-call compensation amounts will be more equitable as well as substantially lower than the figures referenced in the Notice's discussion of "per-call compensation amount" in paragraphs 35-40.[4]

B. International Calls Should be Excluded from the Compensation Mechanism

Although the Notice tentatively concludes that compensation should be paid for international calls, Excel believes that this would be an improper reading of Section 276(b)(1)(A) of the 1996 Act. As the Notice recognizes, the mandate under Section 276(b)(1)(A) to establish a per-call compensation plan only applies to "each and every completed intrastate and interstate

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[2] Notice at para. 16, n.34.

[3] Id. at para. 22, n.64

[4] Id. at paras. 35-40.

call using their payphone."[5] In other words, the statutory language encompasses interstate and intrastate calls under the per-call compensation requirement, but specifically excludes international calls.

The Communications Act of 1934, which the Telecommunications Act of 1996 amended,[6] specifically defines "interstate communication" and "foreign communication."[7] Moreover, in drafting the Telecommunications Act of 1996, Congress specifically used these terms.[8] As a result, it must be assumed that Congress was thoroughly familiar with the distinction between interstate and international calls, and clearly intended to exclude international calls from the per-call compensation mechanism by not including this term in the express language of Section 276.

The Notice's tentative conclusion to exercise general jurisdiction under Section 4(i) and 201(b) of the Communications Act of 1934 by reading coverage for international calls into Section 276 is unjustified.[9] The Notice states that "[w]e find no evidence, however, of congressional intent to leave these calls uncompensated."[10] Such an approach to statutory construction is inappropriate. The proper starting point is that there is no indication, express

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[5] Notice at para. 16.

[6] Telecommunications Act of 1996 §1(B), Pub. L. No. 104-104, 110 Stat. 56 (1996)(to be codified at 47 U.S.C. §§ 151 et seq.)("1996 Act").

[7] Communications Act of 1934, as amended, §§ 153(e) and (f).

[8] Id. at §§ 254(h)(1)(B), 254(k), 102(a) and 502.

[9] Notice at ¶18.

[10] Id.

or otherwise, in either the 1996 Act or legislative history that international calls be included. The Notice's use of Section 4(i) and 201(b) to read an intent into Section 276 for which not a scintilla of evidence exists would establish clearly undesirable precedent.[11] In particular, this approach could be used to read almost any intent into a statute which, based on its express wording, does not convey such meaning.

C. Only Completed Calls Should be Compensated

Section 276(b)(1)(A) mandates that PSP's are to be compensated "for each and every completed intrastate and interstate call using their payphone."[12] Any proposal adopted by the Commission should ensure that compensation is paid only for completed calls.

To the contrary, the Notice appears to contemplate compensation applying to calls "originated" from payphones. Specifically, in paragraphs 15-23 pertaining to the "scope of payphone calls covered by this rulemaking", the Notice repeatedly uses the term "originating" when discussing the calls which will be covered by the compensation mechanism.[13]

Accordingly, Excel believes that the Commission should clarify that the following types of uncompleted calls fall outside of the compensation mechanism. First, calls to debit card or access code platforms that do not successfully reach the called party should not be covered. Since callers placing such calls typically are not billed unless the call they intend to place is

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[11] Just as the Commission concluded in its recent interconnection proceeding that "it would be inconsistent with the 1996 Act to read into Sections 251 and 252 an unexpressed distinction", it must do so here too. See In the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Dkt. No. 96-98 at para. 38 (released Apr. 19, 1996).

[12] 1996 Act at §276(b)(1)(A) (emphasis added).

[13] See, e.g., Notice at paras. 16, 18, 21.

completed to the called party, it would be unfair to require compensation for such calls if the calling party is unable to reach the called party. Second, calls where answer supervision is unavailable should also fall outside the compensation mechanism. The reason here is that there is no way for the IXC to ascertain whether the call was ever completed.

III. THE COMMISSION'S COMPENSATION PROPOSAL WOULD NOT MINIMIZE ADMINISTRATIVE BURDENS AND COSTS

In its Notice, the Commission states that it favors "an approach that minimizes transaction costs on the caller and on the industry."[14] Despite this objective, the compensation plan proposed by the Commission would place a substantial burden on Excel and other IXCs.

The compensation plan contemplated in the Notice would result in a complex and burdensome administrative mechanism. Specifically, since there are over 2,000 private and public payphone providers, IXCs like Excel would be required to enter into a transaction with each such provider every time that compensation was due. The administrative burden of such a requirement is unwarranted Moreover, this burden would not fall on just Excel; it would fall on all of the over 500 IXCs in the long distance industry. Thus, the Notice's proposed carrier-pays compensation plan would require over 1 million [x>(y>500)(z>2000)] separate new transactions that must be established. This burden would impose a particularly harsh strain on

[14] Notice at para. 28. The Notice further states "[w]e believe that the carrier-pays mechanism is preferable because it would result in less transaction costs because the IXC could aggregate its payments to payphone providers." Id.

smaller carriers.[15]

Excel instead believes that more efficient and justifiable alternatives may exist. For example, the Commission could require local exchange carriers ("LECs") to collect and pay out compensation. This alternative makes sense since each LEC has a transaction-based relationship with each and every pay telephone owner connected to its local network. Despite the Notice's claim to the contrary,[16] LECs receive the benefit of payphone calls insofar as they receive access charge revenue from such calls.[17] Alternatively, the Commission could place the burden of tracking calls on PSPs since they are the entities benefitted by such arrangements. Moreover, the PSP should be in a position to identify the IXC receiving the call since the calls originate at their telephone equipment. In short, the IXC is probably the most inappropriate choice for the task of tracking, collecting and paying out compensation.

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[15] Excel is also concerned over the Notice's tentative conclusion that carriers be required to track payphone calls. Notice at para. 31. While Excel has not quantified the cost of this requirement, Excel believes that it would be significant, and would constitute a cost on top of the transaction costs discussed above.

[16] Notice at para. 31, n.82 ("...a LEC ... that carries a payphone's local coin traffic neither benefits from toll-free calls, nor has revenue diverted because of them.") Id.

[17] On a separate note, the Notice is less than clear as to whether LEC intrastate, interexchange operations would be covered by the proposed compensation mechanism, including administration, tracking and payments. At one point, in the context of a discussion on tracking, the Notice states, "all IXCs that carry access code calls and toll-free calls originated from payphones, including the intrastate interexchange operations of LECs, would be required to track payphone calls." Notice at para. 31. To the extent that the Commission adopts an IXC compensation mechanism--which Excel opposes as described herein--it should clarify that the mechanism applies to LEC intrastate interexchange operations.

IV. THE COMMISSION'S PROPOSAL SHOULD, BUT DOES NOT, IMPOSE COMPENSATION REQUIREMENTS ON END USERS

In its Notice, the Commission tentatively concludes that "either a 'carrier-pays' system or a 'set use fee' system where the end user pays would satisfy the requirements of the 1996 Act."[18] In point of fact, however, neither the carrier-pays nor set use fee method imposes the charge on the cost-causative party, the end user.

The Notice recognizes that compensation should be recovered from the party that uses the pay telephone, i.e., the end user.[19] This is both consistent with economic efficiency and Commission policy.[20] Notwithstanding the Notice's acknowledgement that the end user should pay compensation, it nonetheless goes on to propose two alternatives pursuant to which carriers would be called upon to satisfy the per-call compensation requirement (i.e., the carrier-pays and set use fee methods). Instead of assessing such charges directly upon the cost-causers, the end users, the proposal sets up an intermediary level under which carriers would be required to pay the charges and, in turn, recover them from end users. Not only does this approach deviate from the objective of assessing charges upon cost-causers, but it also would create additional administrative and transactional costs for carriers by requiring them to serve as intermediaries between end users and PSPs. Rather than establish an intermediate administrative level involving the carrier, the Commission should consider adhering to its objective by imposing such costs directly upon the end user.

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[18] Notice at para. 28.

[19] Id.

[20] See, e.g., Access Charge Reconsideration Order, 97 FCC 2d 682, 705 (1983).

V. CONCLUSION

Accordingly, Excel proposes that the Commission should adjust its per-call compensation proposal to set compensation at marginal cost. Moreover, the Commission should also recognize that international calls must be excluded from the compensation mechanism and that only completed calls should be compensated. As shown above, due to the complex and burdensome administrative mechanism that the Notice's proposal would call for IXCs to implement, other more efficient alternatives should be pursued. Finally, the Commission should consider imposing the per-call compensation requirement directly upon end users since they are the cost-causers.

Respectfully submitted,

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